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2
3 UNITED STATES DISTRICT COURT
4 DISTRICT OF NEVADA

5 * * *

6 Mark Clifford Sykes,

7 Plaintiff,

8 v.

9 Las Vegas Metropolitan Police Department, et
al.,

10 Defendants.
11

Case No. 2:21-cv-01479-RFB-DJA

Report & Recommendation

12 Plaintiff Mark Clifford Sykes is proceeding *pro se* and *in forma pauperis*. Since the Court
13 screened his initial complaint, Plaintiff has filed an amended complaint (ECF No. 10), a motion
14 for service on unserved defendants (ECF No. 13), a motion for extension of time to serve
15 defendants (ECF No. 16), a motion for the recusal of the undersigned magistrate judge (ECF No.
16 17), and a motion for the recusal of the assigned district judge (ECF No. 18). The assigned
17 district judge, the Honorable District Judge Richard F. Boulware, has referred these items to the
18 undersigned for a report and recommendation.

19 Because the Court finds that certain of Plaintiff's amended claims pass screening, it
20 recommends allowing those claims to proceed and recommends dismissing others. Because the
21 Court finds that Plaintiff's motion for service is premature, the Court recommends denying it.
22 Because the Court finds that Plaintiff's motion for extension is supported by good cause, the
23 Court recommends granting it. Finally, because the Court finds that Plaintiff has not articulated
24 an extrajudicial basis for recusal, it recommends denying Plaintiff's motions for recusal. The
25 Court finds these matters properly resolved without a hearing. LR 78-1.
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1 **I. Background.**

2 **A. Procedural background.**

3 The Court screened Plaintiff's complaint, issuing an order and report and recommendation
4 on December 3, 2021. (ECF No. 5). Plaintiff objected to the report and recommendation (ECF
5 No. 8) and filed an amended complaint on December 27, 2021 (ECF No. 10). Before the Court
6 screened Plaintiff's amended complaint, Plaintiff filed a notice containing summonses for the
7 amended complaint (ECF No. 11), a notice that his summons to Officer Hunt had been returned
8 unexecuted (ECF No. 12), and a motion to serve his amended complaint on Doe and Roe
9 defendants, who Plaintiff has since identified (ECF No. 13). Plaintiff then filed proposed
10 summonses on the docket. (ECF No. 15). On March 1, 2022, Plaintiff moved to extend the time
11 for service. (ECF No. 16). Plaintiff then moved for the recusal of the undersigned magistrate
12 judge and the assigned district judge on April 8, 2022. (ECF Nos. 17 and 18).

13 **B. Factual background.**

14 In his amended complaint, Plaintiff alleges that on August 8, 2020, Las Vegas
15 Metropolitan Police Department (LVMPD) Officer S. Hunt pulled him over for having a
16 headlight out. (ECF No. 10 at 7-8). Plaintiff asserts that, after he stopped, he asked to get out and
17 inspect his headlight. (*Id.*). After seeing that both headlights were working, Officer Hunt refused
18 to let Plaintiff leave, stating, "I have to evaluate you now, what's your name?" (*Id.*). Plaintiff
19 gave Officer Hunt his name and date of birth but questioned Officer Hunt about why he was
20 being detained. (*Id.*).

21 Officer Hunt then looked up Plaintiff's information, which record check erroneously
22 revealed that Plaintiff is a twelve-time convicted felon. (*Id.* at 6, 8, 21-22). Plaintiff asserts that
23 the record keeping agency responsible for providing information to the LVMPD—named as a
24 Roe defendant—published this false information, which Officer Hunt then used to wrongfully
25 detain Plaintiff. (*Id.*). After Officer Hunt looked up Plaintiff's information, he exclaimed,
26 "you're a felon!" (*Id.* at 8). Plaintiff asserts that he "felt an immediate intervention was
27 necessary to protect his physical safety" because "Black males have been getting shot by police
28 officers across the nation after being pulled over..." (*Id.* at 7). He thus asked Officer Hunt to call

1 his watch commander, which request Officer Hunt initially declined. (*Id.* at 8-9). Officer Hunt
2 continued to ask Plaintiff questions, during which Plaintiff repeated his request that Officer Hunt
3 call his watch commander. (*Id.*). During this exchange, Plaintiff called 911. (*Id.*). Officer Hunt
4 then asked Plaintiff to stand in front of Officer Hunt’s vehicle, which Plaintiff did. (*Id.*). At
5 some point during the incident, Plaintiff asserts that Officer Hunt called his supervisor, who
6 Plaintiff asserts was aware of Officer Hunt’s violations and failed to prevent them. (*Id.* at 12-13).
7 Plaintiff speculates that Officer Hunt was on the phone with Sheriff Lombardo. (*Id.* at 18).

8 A sergeant—whom Plaintiff names as a Doe defendant—then arrived. (*Id.* at 10).
9 Plaintiff told the Doe Sergeant that his headlight was not out, after which the Doe Sergeant
10 “became irate,” said Plaintiff was lying, and handcuffed Plaintiff. (*Id.*). Officer Hunt then
11 proceeded to search Plaintiff’s car and glove compartment. (*Id.*). When Plaintiff informed Doe
12 Sergeant that he had never given Officer Hunt consent to search his vehicle, Doe Sergeant stated
13 “he’s not in your vehicle.” (*Id.*). Officer Hunt then took Plaintiff to the Clark County Detention
14 Center where Plaintiff’s clothes were confiscated. (*Id.* at 4). Plaintiff spent two days in the
15 “drunk tank” wearing only underwear and was never given the chance to call anyone or speak
16 with an attorney. (*Id.*). Plaintiff asserts that neither “the district attorney for the State of Nevada
17 nor the magistrate [judge], [took] the [case] as there [were] no convictions and plaintiff was
18 released 2 days later with no charged offenses...” (*Id.* at 6). The ordeal caused Plaintiff to be
19 sick for three weeks after his release. (*Id.*). Officer Hunt’s arrest report, which Plaintiff attaches
20 to his amended complaint, states that Plaintiff was charged with unlawful use of an emergency
21 number and failure by a convicted person to update their address. (ECF No. 10 at 31-32).

22 Plaintiff asserts various constitutional, federal, and state law violations against Officer
23 Hunt, Doe Sergeant, Sheriff Lombardo, the LVMPD, and the Roe record keeping agency arising
24 out of this incident. Plaintiff asserts that he believes Officer Hunt pulled him over for no reason
25 because he is a Black man who was “traveling in a nice vehicle, a Lexus.” (*Id.* at 7). He alleges
26 that both Officer Hunt and Doe Sergeant discriminated against him by “unreasonably search[ing]
27 for reasons to harass and unlawful[ly] seize my person...because of my race.” (*Id.* at 19).
28

1 **II. Screening Plaintiff’s amended complaint.**

2 Upon granting an application to proceed *in forma pauperis*, courts additionally screen the
 3 complaint pursuant to § 1915(e). Federal courts are given the authority to dismiss a case if the
 4 action is legally “frivolous or malicious,” fails to state a claim upon which relief may be granted,
 5 or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C.
 6 § 1915(e)(2). When a court dismisses a complaint under § 1915, the plaintiff should be given
 7 leave to amend the complaint with directions as to curing its deficiencies, unless it is clear from
 8 the face of the complaint that the deficiencies could not be cured by amendment. *See Cato v.*
 9 *United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

10 **A. Plaintiff’s constitutional claims.**

11 Plaintiff asserts six constitutional claims against Officer Hunt, Doe Sergeant, Sheriff
 12 Lombardo, and the LVMPD: (1) violations of his Fifth Amendment due process rights;
 13 (2) violations of his Fourteenth Amendment due process rights; (3) violations of his Fourteenth
 14 Amendment equal protection rights; (4) unreasonable search and seizure in violation of his Fourth
 15 Amendment rights; (5) unlawful arrest in violation of his Fourth Amendment rights; (5) violations
 16 of 42 U.S.C. § 1985; and (6) violations of 42 U.S.C. § 1986. Because Plaintiff is suing a local
 17 government and its officials for violations of substantive rights conferred by the Constitution,
 18 these claims arise under 42 U.S.C. § 1983. *See Gardner v. Las Vegas Metropolitan Police Dep’t*,
 19 No. 2:17-cv-00352-PAL, 2019 WL 1923634, at *7 (D. Nev. Apr. 29, 2019) (citing *Graham v.*
 20 *Connor*, 490 U.S. 386, 393-94 (1989)).

21 1. The Court recommends dismissing Plaintiff’s constitutional claims against
 22 Doe Sergeant in his official capacity, Sheriff Lombardo, and the LVMPD.

23 The Court recommends dismissing Plaintiff’s constitutional claims against Doe Sergeant
 24 in his official capacity because Doe Sergeant in his official capacity is a redundant defendant. A
 25 42 U.S.C. § 1983 official capacity suit against an officer is equivalent to a 42 U.S.C. § 1983 suit
 26 against a municipality. *See Center for Bio-Ethical Reform, Inc. v. Los Angeles Cnty. Sheriff*
 27 *Dep’t*, 533 F.3d 780, 799 (9th Cir. 2008). Because Plaintiff has separately named the LVMPD,
 28 Doe Sergeant in his official capacity is a redundant defendant. *See id.*

1 The Court recommends dismissing Plaintiff’s constitutional claims against Sheriff
2 Lombardo because Plaintiff has not explained how Sheriff Lombardo personally participated in
3 the constitutional deprivations Plaintiff alleges. A supervisor is only liable for constitutional
4 violations of his subordinates if the supervisor participated in or directed the violations or knew of
5 the violations and failed to act to prevent them. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.
6 1989). There is no *respondeat superior* liability under 45 U.S.C. § 1983. *Id.* Although Plaintiff
7 alleges that Officer Hunt was on the phone with his supervisor during part of the incident,
8 Plaintiff only speculates that the individual with whom Officer Hunt was speaking was Sheriff
9 Lombardo. (ECF No. 10 at 13). These are not enough facts to allege that Sheriff Lombardo
10 personally participated in Officer Hunt’s alleged constitutional violations.

11 The Court also recommends dismissing Plaintiff’s constitutional claims against LVMPD.
12 A government entity may be found liable under 42 U.S.C. § 1983 only when its policy, practice,
13 or custom inflicts injury upon a plaintiff. *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). A
14 municipality may not be sued under 42 U.S.C. § 1983 solely because an injury was inflicted by its
15 employees or agents. *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006).
16 There must be a “direct causal link between a municipal policy, practice, or custom and the
17 alleged constitutional deprivation.” *Castro v. County of Los Angeles*, 833 F.3d 1060, 1075 (9th
18 Cir. 2016). The custom or policy must be a deliberate choice to follow a course of action made
19 from among various alternatives by the official or officials responsible for establishing the final
20 policy in question. *Id.* To establish municipal liability under 42 U.S.C. § 1983, a plaintiff must
21 show that: (1) he was deprived of a constitutional right; (2) the defendant had a policy or custom;
22 (3) the policy or custom amounted to deliberate indifference to the constitutional right; and (4) the
23 policy or custom was the moving force behind the constitutional violation. *Gravelet-Blondin v.*
24 *Shelton*, 728 F.3d 1086, 1096 (9th Cir. 2013). To meet these requirements, the plaintiff must
25 show both causation in fact and proximate causation. *Id.* Stated differently, a plaintiff must show
26 that an official policy, custom, or practice on the part of the defendant was the actionable cause of
27 the claimed injury. *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1143 (9th Cir. 2012).

Here, Plaintiff has asserted that LVMPD established a “policy, practice, and custom of subjecting members of the Main Class¹ to police stops without...reasonable suspicion....” (ECF No. 10 at 14). However, Plaintiff’s allegations of a policy, practice, and custom are conclusory and do not describe the policy, practice, or custom or connect it to Officer Hunt and Doe Sergeant’s actions. Plaintiff has not described how LVMPD made a deliberate choice to conduct stops, arrests, or detentions based on pretextual reasons. Nor has he connected any official policy, custom, or practice to the incident he alleges. The Court thus recommends dismissing Plaintiff’s constitutional claims against Doe Sergeant in his official capacity with prejudice, against Sheriff Lombardo without prejudice, and against LVMPD without prejudice.

2. The Court recommends dismissing Plaintiff’s Fifth Amendment claims against all Defendants with prejudice because amendment would be futile.

Plaintiff attempts to raise a Fifth Amendment due-process claim, but his claim against state officials—LVMPD, Sheriff Lombardo, Officer Hunt, and Doe Sergeant—is grounded in the Fourteenth Amendment, rather than the Fifth Amendment. *See Castillo v. McFadden*, 399 F.3d 993, 1002 n.5 (9th Cir. 2005) (holding that “[t]he Fifth Amendment prohibits the federal government from depriving persons of due process, while the Fourteenth Amendment explicitly prohibits deprivations without due process by the several States”). The Court thus recommends dismissing Plaintiff’s Fifth Amendment due process claims with prejudice because amendment would be futile.

3. The Court recommends allowing Plaintiff’s Fourteenth Amendment due process claims to proceed against Officer Hunt and Doe Sergeant.

“Citizens have a fundamental right of free movement historically part of the amenities of life as we have known them.” *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997). To establish a substantive due process violation, a plaintiff must show that the defendant deprived him or his life, liberty, or property and engaged in “conscience shocking behavior.”

¹ Plaintiff refers to a “Main Class” and “Subclass” throughout his claims. Plaintiff appears to use these terms interchangeably to refer to Black and African American members of the community. The Court interprets these terms as such.

1 *Perez-Morciglio v. Las Vegas Metropolitan Police Dep't*, 820 F.Supp.2d 1111, 1126-27 (D. Nev.
 2 Oct. 25, 2011) (citing *Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2006)). An official's
 3 conduct may shock the conscience where the official acts with the purpose to harm in a rapidly
 4 evolving situation, or where he acts with deliberate indifference or reckless disregard for the
 5 plaintiff's rights in situations where the official had the opportunity to deliberate. *Tennison v.*
 6 *City & Cnty. of S.F.*, 570 F.3d 1078, 1089 (9th Cir. 2009); *Porter v. Osborn*, 546 F.3d 1131,
 7 1137–39 (9th Cir. 2008).

8 Plaintiff alleged that Officer Hunt pulled him over under the false pretense that Plaintiff's
 9 headlight was out, depriving him of his right to travel. (ECF No. 10 at 5-7). Plaintiff also asserts
 10 that Doe Sergeant arrested him for a pretextual reason—because he was allegedly lying about his
 11 headlight—and detained him in the Clark County Detention Center “drunk tank” for two days.
 12 (*Id.* at 4, 10). Taking Plaintiff's allegations as true, he has sufficiently alleged that Officer Hunt
 13 and Doe Sergeant impeded his right to movement and deprived him of his liberty. Because
 14 Plaintiff asserts that Officer Hunt and Doe Sergeant pulled him over and arrested him,
 15 respectively, for pretextual reasons, he has also sufficiently alleged that they engaged in
 16 conscience shocking behavior, disregarding Plaintiff's rights where they had the opportunity to
 17 deliberate. The Court thus recommends that Plaintiff's Fourteenth Amendment due process
 18 claims proceed against Doe Sergeant and Officer Hunt.

19 4. The Court recommends allowing Plaintiff's Fourteenth Amendment equal
 20 protection claims to proceed against Officer Hunt and Doe Sergeant.

21 The Equal Protection Clause commands that no state shall “deny to any person within its
 22 jurisdiction the equal protection of the laws.” U.S. Const. Amend. 14 § 1. The Equal Protection
 23 Clause requires the government to treat all similarly situated persons alike. *City of Cleburne v.*
 24 *Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). If a law is administered to discriminate
 25 unjustly between persons similarly situated, a denial of equal protection may be the result.
 26 *Guillory v. County of Orange*, 731 F.2d 1379, 1383 (9th Cir. 1984).

27 Plaintiff asserts that Officer Hunt pulled him over, asked him multiple questions, and
 28 evaluated his record not because his headlight was out, but because Plaintiff “is a black male

1 traveling in a nice vehicle.” (ECF No. 10 at 7). Plaintiff also asserts that Doe Sergeant arrested
2 him because he is Black, instead of for the fabricated reason that Plaintiff unlawfully used 911 or
3 that Plaintiff was lying about his headlight. (ECF No. 10 at 19). Indeed, Plaintiff asserts that he
4 had a legitimate reason for calling 911 because he felt threatened by Officer Hunt’s actions.
5 (ECF No. 10 at 5-6). Liberally construing Plaintiff’s complaint, Plaintiff has alleged that Officer
6 Hunt and Doe Sergeant administered the law unjustly—by pulling Plaintiff over and arresting him
7 for pretextual reasons—because he is Black. Although he does not explicitly allege it, inherent in
8 Plaintiff’s allegations is the premise that Officer Hunt and Doe Sergeant would not have pulled
9 him over or arrested him if he were not Black. Plaintiff has thus sufficiently alleged that Officer
10 Hunt and Doe Sergeant administered the law to discriminate unjustly between persons similarly
11 situated. The Court thus recommends that Plaintiff’s 42 U.S.C. § 1983 claims for violation of his
12 Fourteenth Amendment equal protection rights proceed against Officer Hunt and Doe Sergeant.

13 5. The Court recommends allowing Plaintiff’s Fourth Amendment
14 unreasonable search and seizure claims to proceed against Officer Hunt
15 and Doe Sergeant.

16 The Fourth Amendment protects the “right of the people to be secure in their persons,
17 houses, papers, and effects, against unreasonable searches and seizures,” and requires that a
18 warrant sanctioning a search or seizure be supported by probable cause. U.S. Const. Amend. 4.
19 A supervisor is liable for a constitutional violation by his subordinate if the supervisor
20 participated in or directed the violations or knew of the violations and failed to act to prevent
21 them. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Plaintiff has alleged that Officer Hunt
22 began searching his car and glove compartment without justification or probable cause. Plaintiff
23 asserts that Doe Sergeant witnessed Officer Hunt search Plaintiff’s glove compartment and
24 ignored the violation, even telling Plaintiff that Officer Hunt was “not in [the] car” after Plaintiff
25 complained about the violation. (ECF No. 10 at 10). Construing Plaintiff’s complaint liberally,
26 the Court recommends that Plaintiff’s 42 U.S.C. § 1983 claim against Officer Hunt and Doe
27 Sergeant for violating his Fourth Amendment rights proceed.
28

6. The Court recommends allowing Plaintiff's Fourth Amendment unlawful arrest claims to proceed against Officer Hunt and Doe Sergeant.

A claim for unlawful arrest is cognizable under 42 U.S.C. § 1983 as a violation of the Fourth Amendment, provided the arrest was without probable cause or other justification. *Dubner v. City & Cnty. of S.F.*, 266 F.3d 959, 964-65 (9th Cir. 2001). An arrest generally must be supported by probable cause. *Id.* Probable cause exists if, at the moment of arrest, under the totality of the circumstances known to the arresting officers (or within the knowledge of the other officers at the scene), a prudent person would believe the subject had committed a crime. *Blankenhorn v. City of Orange*, 485 F.3d 463, 471-72 (9th Cir. 2007).

Plaintiff asserts that, after Officer Hunt pulled him over and Plaintiff called 911, Doe Sergeant arrived, became irate after Plaintiff told him his car headlights were both working, and placed Plaintiff in handcuffs. Plaintiff asserts that the stated reason for his arrest—using an emergency number when no emergency existed and not updating his address—was fabricated because Plaintiff had a legitimate reason to call 911 and is not a twelve-time convicted felon. (ECF No. 10 at 6). Because the Court must determine whether Doe Sergeant had probable cause to arrest Plaintiff upon arriving at the scene, the Court recommends that Plaintiff's 42 U.S.C. § 1983 claim that Doe Sergeant violated his Fourth Amendment rights by arresting him proceed. While Plaintiff asserts this claim against Officer Hunt, based on Plaintiff's complaint, it appears that Doe Sergeant—not Officer Hunt—ultimately arrested Plaintiff. The Court thus recommends that Plaintiff's 42 U.S.C. § 1983 claim that Officer Hunt violated his Fourth Amendment rights by arresting him be dismissed without prejudice.

7. The Court recommends dismissing Plaintiff's 42 U.S.C. § 1985(3) claims against Officer Hunt and Doe Sergeant without prejudice.

"To state a cause of action under § 1985(3), a complaint must allege (1) a conspiracy, (2) to deprive any person or a class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, (3) an act by one of the conspirators in furtherance of the conspiracy, and (4) a personal injury, property damage or a deprivation of any right or privilege of a citizen of the United States." *See Gilliespie v. Civiletti*, 629 F.2d 637, 641 (9th Cir.

1 1980) (citing *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971)). “The language requiring
 2 intent to deprive of equal protection, or equal privileges and immunities, means that there must be
 3 some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the
 4 conspirators’ action.” *See Griffin*, 403 U.S. at 102. “A claim under this section must allege facts
 5 to support the allegation that defendants conspired together. A mere allegation of conspiracy
 6 without factual specificity is insufficient.” *See Karim–Panahi v. Los Angeles Police Dept.*, 839
 7 F.2d 621, 626 (9th Cir. 1988).

8 Plaintiff claims that Doe Sergeant knew that Officer Hunt was conducting a search of
 9 Plaintiff’s glove compartment and lied, stating “[Officer Hunt]’s not in your car.” (ECF No. 10 at
 10 10). But this is not sufficient factual specificity to support the allegation that Doe Sergeant and
 11 Officer Hunt conspired together. While Plaintiff alleges that Officer Hunt and Doe Sergeant
 12 separately violated his equal protection rights, he does not include enough factual specificity to
 13 allege that they conspired together to do so. The Court thus recommends dismissing Plaintiff’s
 14 42 U.S.C. § 1985 claim as alleged against Officer Hunt and Doe Sergeant without prejudice.

15 8. The Court recommends dismissing Plaintiff’s 42 U.S.C. § 1986 claim
 16 alleged against Officer Hunt and Doe Sergeant without prejudice.

17 Plaintiff asserts that Officer Hunt and Doe Sergeant, “after knowledge that none of
 18 plaintiff’s headlights [were] out failed to stop and correct his wrongs an allow the plaintiff to
 19 continue with his travels...” (ECF No. 10 at 23). Under 42 U.S.C. § 1986,

20 Every person who, having knowledge that any of the wrongs
 21 conspired to be done, and mentioned in the preceding section [42
 22 USCS § 1985], are about to be committed, and having power to
 23 prevent or aid in preventing the commission of the same, neglects or
 refuses so to do, if such wrongful act be committed, shall be liable
 to the party injured.

24 As discussed more fully above, Plaintiff has not sufficiently alleged a conspiracy under 42
 25 U.S.C. § 1985 and thus, does not sufficiently allege a violation of 42 U.S.C. § 1986. The Court
 26 thus recommends dismissing Plaintiff’s 42 U.S.C. § 1986 claim as alleged against Officer Hunt
 27 and Doe Sergeant without prejudice.
 28

B. Plaintiff's Title IV Civil Rights Act discrimination claims.

1. The Court recommends dismissing Plaintiff's Title VI claim against Officer Hunt, Doe Sergeant, and Sheriff Lombardo without prejudice.

As a preliminary matter, a plaintiff pleading a Title VI claim can only seek recovery from the recipient of the federal funding, not individuals. *Alexander v. Underhill*, 416 F.Supp.2d 999, 1007 (D. Nev. Feb. 17, 2006) (citing *Shotz v. City of Plantation*, 344 F.3d 1161, 1169-70 (11th Cir. 2003)). However, it appears that the Ninth Circuit has not yet addressed the issue of whether Title VI provides for relief against individual defendants. Plaintiff alleges this claim against Officer Hunt, Doe Sergeant, and Sheriff Lombardo. (ECF No. 10 at 26). However, because these are individual defendants, the Court recommends dismissing Plaintiff's Title VI claim as alleged against Officer Hunt, Doe Sergeant, and Sheriff Lombardo. Because the Ninth Circuit has not yet ruled whether Title VI provides relief against individual defendants, the Court recommends denying the claims without prejudice.

2. The Court recommends allowing Plaintiff's Title VI claim as alleged against LVMPD to proceed.

Title VI states "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. A *prima facie* case of disparate impact under Title VI requires the plaintiff to: (1) identify the specific practices or policies being challenged; (2) show disparate impact; and (3) prove causation. *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990). The second and third factors are generally shown with statistics. *U.S. v. Maricopa County, Ariz.*, 915 F.Supp.2d 1073, 1078 (D. Ariz. Dec. 12, 2012) (citing *Rose*, 902 F.2d at 1424). However, at the motion to dismiss stage, a complaint need not allege statistical data. *Id.*

Liberal construing Plaintiff's complaint and taking his allegations as true, the Court recommends allowing Plaintiff's Title VI claim to proceed as alleged against LVMPD. Plaintiff has identified LVMPD's traffic stops and subsequent searches as the policies he is challenging. Plaintiff has also alleged that LVMPD uses traffic stops disparately to unlawfully detain Black

1 individuals. Plaintiff asserts that, “the records of the LVMPD will show” that more Black
 2 individuals are pulled over, detained, and arrested than other individuals. The Court thus
 3 recommends allowing Plaintiff’s Title VI claim to proceed as alleged against LVMPD.

4 **C. *Plaintiff’s state law claims.***

- 5 1. The Court recommends dismissing Plaintiff’s harassment claim against
 6 Officer Hunt with prejudice.

7 As a preliminary matter, the Court construes Plaintiff’s claim as alleged against only
 8 Officer Hunt. While Plaintiff asserts that his claim is against “Officer Hunt, et al.,” Plaintiff
 9 provides no facts specific to any other Defendant other than Officer Hunt. Plaintiff claims that
 10 Officer Hunt “continued to harass [P]laintiff when it was determined that [P]laintiff[’s] front
 11 headlight was not out” by “further asking him questions, searching for a probable cause, detaining
 12 and seizing his person for 2 days...” (ECF No. 10 at 24). Plaintiff’s claims, however, are more
 13 appropriately brought under 42 U.S.C. § 1983, rather than as “harassment” which is not a stand-
 14 alone cause of action. The Court thus recommends dismissing Plaintiff’s harassment claim
 15 against Officer Hunt with prejudice because amendment would be futile.

- 16 2. The Court recommends allowing Plaintiff’s defamation claim to proceed
 17 against Officer Hunt and the Roe record keeping agency.

18 Defamation encompasses both slander (spoken) and libel (written) defamatory statements.
 19 *Flowers v. Carville*, 292 F. Supp. 2d 1225, 1232 n.1 (D. Nev. 2003), *aff’d*, 161 F. App’x 697 (9th
 20 Cir. 2006). To state a claim for defamation, Plaintiff must allege “(1) a false and defamatory
 21 statement by [a] defendant concerning the plaintiff; (2) an unprivileged publication to a third
 22 person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages.” *Rosen*
 23 *v. Tarkanian*, 453 P.3d 1220, 1225 (Nev. 2019) (quotation omitted); *see also* Nev. Rev. Stat.
 24 § 200.510(1) (defining libel). As a preliminary matter, while Plaintiff asserts his claim against
 25 “Officer S. Hunt and unknown records agency (public or otherwise), et al.,” Plaintiff has not
 26 included any facts about Doe Sergeant, the LVMPD, or Sheriff Lombardo. The Court thus
 27 construes Plaintiff as asserting this claim against Officer Hunt and the Roe record keeping agency
 28 only. Plaintiff has alleged that: (1) Officer Hunt wrote a false statement that Plaintiff unlawfully

1 called 911 in his police report and that the Roe record keeping agency published a false statement
 2 about Plaintiff's status as a twelve-time felon; (2) Officer Hunt published the police report to the
 3 LVMPD and the Roe record keeping agency published the false statement to everyone capable of
 4 accessing the record; (3) that the publications were intentional; and (4) that Plaintiff suffered
 5 damages. The Court recommends allowing Plaintiff's defamation claim to proceed against
 6 Officer Hunt and the Roe record keeping agency.

7 3. The Court recommends allowing Plaintiff's intentional infliction of
 8 emotional distress claim to proceed against Officer Hunt and Doe Sergeant.

9 The elements of an intentional infliction of emotional distress claim are: (1) extreme and
 10 outrageous conduct with either the intention of, or disregard for, causing emotional distress;
 11 (2) the plaintiff...suffered severe or extreme emotional distress; and (3) actual or proximate
 12 causation. *Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev. 372, 378-79 (1999). Extreme and
 13 outrageous conduct is that which is "outside all possible bounds of decency" and regarded as
 14 "utterly intolerable" in a civilized society. *Maduik v. Agency Rent-A-Car*, 114 Nev. 1, 4 (1998).
 15 Plaintiff alleges that the LVMPD and Officer Hunt "engaged in extreme and outrageous conduct
 16 when they detained Plaintiff and threw him "in a cell for 2 days with nothing but his underwear
 17 on." (ECF No. 10 at 25). Plaintiff asserts: (1) that Hunt engaged in extreme and outrageous
 18 conduct by placing him in the "drunk tank" without having had cause to pull him over in the first
 19 place and that LVMPD engaged in extreme and outrageous conduct by taking his clothes away
 20 and keeping in the "drunk tank" for two days; (2) that he suffered extreme distress and became
 21 sick for three weeks after the incident; and (3) that Officer Hunt and the LVMPD's actions caused
 22 his distress. (ECF No. 10 at 15-26). The Court thus recommends allowing Plaintiff's intentional
 23 infliction of emotional distress claim to proceed against Officer Hunt and the LVMPD.

24 4. The Court recommends dismissing Plaintiff's negligent infliction of
 25 emotional distress claim against Officer Hunt and LVMPD with prejudice.

26 Negligent infliction of emotional distress claims are typically brought by bystanders who
 27 experience emotional distress witnessing an injury to a close relative. *See Grotts v. Zahner*, 115
 28 Nev. 339, 340 (1999). Nevada has not yet recognized whether a negligent infliction of emotional

distress claim is available for a direct victim, rather than a bystander. *See Lucatelli v. Texas De Brazil (Las Vegas) Corp.*, No. 2:11-cv-01829-RCJ-VCF, 2012 WL 1681394, at *6 (D. Nev. May 11, 2012). However, the Nevada Supreme Court has recognized that “negligent infliction of emotional distress can be an *element of the damage* sustained by the negligent acts committed directly against the victim-plaintiff” because it is “only logical” for a direct victim to recover “if a bystander can recover for negligent infliction of emotional distress.” *Id.* (citing *Shoen v. Amerco, Inc.*, 111 Nev. 735, 748 (1995)).

While Plaintiff could potentially assert negligent infliction of emotional distress as an element of the damages he claims, he cannot assert it as a separate claim. Moreover, Plaintiff has only alleged intentional torts, not claims sounding in negligence. Because Plaintiff has not asserted any negligence claims, he has no grounds on which to seek damages for negligent infliction of emotional distress. The Court thus recommends that Plaintiff’s negligent infliction of emotional distress claim against Officer Hunt and LVMPD be dismissed with prejudice because amendment would be futile.

III. The Court recommends denying Plaintiff’s motion for service as premature.

Plaintiff has moved to serve unserved defendants, explaining that he has identified Doe Sergeant and the Roe record keeping agency. (ECF No. 13). However, Plaintiff must first amend his complaint to name these individuals before he can serve them with summons and the complaint. *See DeLew v. Las Vegas Metropolitan Police Dep’t*, No. cv-S-00-0460 RLH (LRL), 2001 WL 37120896, at *1-2 (D. Nev. Apr. 5, 2001) (applying the Federal Rule of Civil Procedure 15 motion to amend standard to a plaintiff’s request to substitute named defendants for Doe defendants). The Court thus recommends denying Plaintiff’s motion for service as premature.

IV. The Court recommends granting Plaintiff’s motion for an extension.

Plaintiff has moved to extend the deadline of March 3, 2022 to serve Defendants. (ECF No. 16). Federal Rule of Civil Procedure 4(m) provides that a court must extend the time for service if a plaintiff shows good cause for failing to serve a defendant within ninety days after the complaint is filed. Plaintiff has demonstrated good cause to extend the service deadline, explaining that he has identified two Doe and Roe defendants and amended his complaint, which

1 was pending the Court's screening process. The Court thus recommends granting Plaintiff's
 2 motion to extend and setting the service deadline ninety days from the date of the Honorable
 3 District Judge Richard F. Boulware's decision on the undersigned's report and recommendation.

4
 5 **V. The Court recommends denying plaintiff's motion for recusal of the undersigned**
magistrate judge and motion for recusal of the assigned district judge.

6
 7 The substantive standard for recusal under 28 U.S.C. § 455 is "whether a reasonable
 8 person with knowledge of all the facts would conclude that the judge's impartiality might
 9 reasonably be questioned." *United States v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986)
 10 (quoting *Mayes v. Leipziger*, 729 F.2d 605, 607 (9th Cir. 1984)). Normally, the alleged bias must
 11 stem from an "extrajudicial source." *Liteky v. United States*, 510 U.S. 540, 554-56 (1994).
 12 "[J]udicial rulings alone almost never constitute valid basis for a bias or partiality motion." *Id.* at
 13 555. "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the
 14 course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or
 15 partiality motion unless they display a deep-seated favoritism or antagonism that would make fair
 16 judgment impossible." *Id.*

17 Plaintiff argues for the recusal of both the undersigned magistrate judge and the assigned
 18 district judge because Plaintiff asserts that the judges assigned to his case have skipped over his
 19 filings. Plaintiff claims that he has filed seven items since December 15, 2021 which have not yet
 20 been decided while orders have promptly been issued in other cases where plaintiffs paid the
 21 filing fee. Plaintiff argues that this is evidence of bias.

22 However, delays in addressing these filings do not provide grounds for recusal because
 23 such delays are not extrajudicial. *Hulihan v. Reg'l Transp. Comm'n of S. Nev.*, No. 2:09-cv-
 24 01096-ECR-RJJ, 2011 WL 5546286, at *2-3 (D. Nev. Nov. 14, 2011) (finding that a plaintiff's
 25 complaints about the amount of time it took the court to rule on her numerous motions were not
 26 extrajudicial and could not ground recusal). The time it has taken to decide Plaintiff's motions in
 27 this case is not unusual, especially given the number of documents he has filed. Moreover,
 28 Plaintiff fails to consider that certain orders—like the ones Plaintiff has cited as proof of bias—

1 take less time than others. The Court does not simply decide motions in order of when they are
2 filed but considers a variety of factors in determining the order in which it will decide motions.
3 Plaintiff has filed multiple documents which the Court must read and consider. Plaintiff has also
4 filed a forty-two-page amended complaint, which the Court must screen. The Court has done so
5 in due course. Because Plaintiff's allegations are not extrajudicial and do not provide a basis for
6 recusal, the Court recommends denying Plaintiff's motions to recuse.

7
8 **IT IS THEREFORE RECOMMENDED** that Plaintiff's claims listed below be **allowed**
9 **to proceed:**

- 10 • Plaintiff's Fourteenth Amendment due process claims against Officer Hunt and Doe
11 Sergeant.
- 12 • Plaintiff's Fourteenth Amendment equal protection claims against Office Hunt and Doe
13 Sergeant.
- 14 • Plaintiff's Fourth Amendment unreasonable search and seizure claims against Officer
15 Hunt and Doe Sergeant.
- 16 • Plaintiff's Fourth Amendment unlawful arrest claims against Officer Hunt and Doe
17 Sergeant.
- 18 • Plaintiff's Title VI claim against LVMPD.
- 19 • Plaintiff's defamation claims against Officer Hunt and Roe record keeping agency.
- 20 • Plaintiff's intentional infliction of emotional distress claims against Officer Hunt and Doe
21 Sergeant.

22
23 **IT IS FURTHER RECOMMENDED** that Plaintiff's claims listed below be **dismissed**
24 **without prejudice:**

- 25 • Plaintiff's constitutional claims against Sheriff Lombardo.
- 26 • Plaintiff's constitutional claims against LVMPD.
- 27 • Plaintiff's 42 U.S.C. § 1985 claims against Officer Hunt and Doe Sergeant.
- 28 • Plaintiff's 42 U.S.C. § 1986 claims against Officer Hunt and Doe Sergeant.

- Plaintiff's Title VI claims against Officer Hunt, Doe Sergeant, and Sheriff Lombardo.

IT IS FURTHER RECOMMENDED that Plaintiff's claims listed below be **dismissed with prejudice**:

- Plaintiff's constitutional claims against Doe Sergeant in his official capacity.
- Plaintiff's Fifth Amendment claims against Officer Hunt, Doe Sergeant, Sheriff Lombardo, and LVMPD.
- Plaintiff's harassment claim against Officer Hunt.
- Plaintiff's negligent infliction of emotional distress claims against Officer Hunt and LVMPD.

IT IS FURTHER RECOMMENDED that Plaintiff's motion for service (ECF No. 13) be **denied as premature**

IT IS FURTHER RECOMMENDED that Plaintiff's motion to extend time (ECF No. 16) be **granted in part and denied in part** and that the service deadline be set **ninety days** from the date of the Honorable District Judge Richard F. Boulware's decision on the undersigned's report and recommendation.

IT IS FURTHER RECOMMENDED that Plaintiff's motions for recusal (ECF Nos. 17 and 18) be **denied**.

NOTICE

This report and recommendation is submitted to the United States District Judge assigned to this case under 28 U.S.C. § 636(b)(1). A party who objects to this report and recommendation may file a written objection supported by points and authorities within fourteen days of being served with this report and recommendation. Local Rule IB 3-2(a). Failure to file a timely

1 objection may waive the right to appeal the district court's order. *Martinez v. Ylst*, 951 F.2d
2 1153, 1157 (9th Cir. 1991).

3
4 DATED: April 22, 2022

A handwritten signature in blue ink, appearing to read 'D. Albregts', is written over a horizontal line.

DANIEL J. ALBREGTS
UNITED STATES MAGISTRATE JUDGE